

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902-E) for an Order Implementing Assembly Bill 265.

Application 00-10-045
(Filed October 24, 2000)

Application of San Diego Gas & Electric Company (U 902-E) for Authority to Implement an Electric Rate Surcharge to Manage the Balance in the Energy Rate Ceiling Revenue Shortfall Account.

Application 01-01-044
(Filed January 24, 2001)

**OPINION ON MOTIONS FOR STAY AND RECONSIDERATION
OF ASSIGNED COMMISSIONER'S RULING****1. Summary**

This decision resolves two motions by San Diego Gas & Electric Company (SDG&E) that pertain to a May 16, 2002 procedural ruling of the Assigned Commissioner (May 16 ACR).

2. Background

By letter to the Commission's General Counsel dated May 10, 2002, copies of which were sent to each Commissioner, SDG&E's parent Sempra Energy transmitted to the Commission a proposed Settlement Agreement that, according to the letter, would "resolve fully and completely the federal court litigation" in SDG&E v. Loretta Lynch, et al., United States District Court for the Southern District, Case Number 02CV339 BTM (LAB). In the letter, Sempra Energy requested expedited Commission consideration of the proposed Settlement Agreement in closed session on May 16, 2002.

The May 16 ACR found that the proposed Settlement Agreement would resolve substantive issues pending in this proceeding that pertain to certain intermediate term power procurement contracts. It then directed SDG&E to do the following:

1. No later than Monday, May 20, 2002, San Diego Gas and Electric Company (SDG&E) shall serve a copy of the above-described letter from Sempra Energy and the accompanying proposed Settlement Agreement on parties of record in the captioned proceedings. Copies shall also be served electronically on those parties on the service list that have provided an e-mail address.
2. Pursuant to Rules 5, 7, and 7.1 of the Rules of Practice and Procedure (Rules), SDG&E shall file notice(s) of any communication(s) with decisionmakers that concern substantive issues in the captioned proceedings, including issues pertaining to the power procurement contracts that are addressed in the proposed Settlement Agreement, if such communication(s) did not occur in a public hearing, workshop, or other public setting, or on the record.
3. In the event that SDG&E wishes to pursue implementation of the proposed Settlement Agreement or any other settlement regarding issues in this proceeding, it shall do so in accordance with the rules governing stipulations and settlements set forth in Article 13.5 (Rule 51, et seq.) and the Rules.

On May 20, 2002, San Diego Gas & Electric Company filed and served a response to the May 16 ACR. SDG&E complied with Ordering Paragraph 1 of the ruling by attaching the May 10 Sempra Energy letter and the accompanying proposed Settlement Agreement to the response. In its response, SDG&E stated its objections to Ordering Paragraphs 2 and 3 of the May 16 ACR and announced

its intention to file a motion for full Commission reconsideration of those Ordering Paragraphs along with a motion for a stay of Ordering Paragraph 2.

On May 22, 2002, SDG&E filed and served two motions in the above-captioned proceeding:

San Diego Gas & Electric Company's Motion for the Issuance, on an Ex Parte Basis, of an Immediate Stay of Assigned Commissioner's Ruling Directing (1) Service of Documents and (2) Filing of Notice of Ex Parte Communication (Motion for Stay).

San Diego Gas & Electric Company's Motion for Reconsideration to the Full Commission of Assigned Commissioner's Ruling Directing (1) Service of Documents and (2) Filing of Notice of Ex Parte Communication (Motion for Reconsideration).

On May 29, 2002, pursuant to Rule 45 (f) of the Commission's Rules of Practice and Procedure (Rules), the Administrative Law Judge (ALJ) issued a ruling shortening the time for responses to SDG&E's motions. Utility Consumers' Action Network (UCAN) and City of San Diego (City) timely filed responses on June 3, 2002.¹

On June 7, 2002 the Assigned Commissioner issued a ruling clarifying the May 16 ACR in the following respects:

1. The Ruling of May 16, 2002 does not preclude SDG&E from discussing with the Commission's General Counsel's office or proposing resolution of the issues that are the subject of the pending federal court litigation.
2. Nothing in the Ruling of May 16, 2002 shall preclude SDG&E from simultaneously proposing to the Commission, and all

¹ UCAN responded to the Motion for Reconsideration. City filed a consolidated response to both motions.

parties of the captioned proceeding, resolution of the issues that are the subject of the pending federal court litigation, upon which the parties would be allowed to comment.

3. Motion for Stay

SDG&E requests an immediate stay of Ordering Paragraphs 2 and 3 of the May 16 ACR. As discussed in the following section, we affirm the May 16 ACR and deny SDG&E's request that we vacate Ordering Paragraphs 2 and 3 of the ACR. Because we are disposing of the Motion for Reconsideration in this decision, SDG&E's request for immediate relief pending disposition of the Motion for Reconsideration is moot and will therefore be dismissed.

4. Motion for Reconsideration

4.1 Interlocutory Appeals of Presiding Officers' Rulings

It is well established that interlocutory appeals of presiding officers' rulings on procedural and evidentiary matters are disfavored by the Commission:

"We note at the outset, that today's decision is a rare occurrence in that we are reviewing a ruling made by an ALJ before we have considered the merits of the entire proceeding. Normally, we are reluctant to review evidentiary and procedural rulings before the proceeding has been submitted. (See Rule 65.) Our reasoning for that has been expressed previously:" (*Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1994) 55 CPUC2d 672, 676.)

"There is no appeal from a procedural or evidentiary ruling of a presiding officer prior to consideration by the Commission of the entire merits of the matter. The primary reasons for this rule are to prevent piecemeal disposition of litigation and to prevent litigants from frustrating the Commission in the performance of its regulatory functions by inundating the Commission with interlocutory appeals on procedural and evidentiary matters.'" (*Id.*, quoting Decision (D.) 87070.)

“Parties who contemplate appealing a ruling with which they are dissatisfied should recognize that we frown on such practice, and view this kind of decision as the rare exception rather than the rule.” (*Id.*)

In a 1998 decision, the Commission observed that its presiding officers, “of necessity, must have the authority to pass on discovery motions and impose sanctions for discovery abuse.” The Commission once again quoted from D.87070, and went on to note there is an additional basis for disfavoring interlocutory appeals:

“...[W]e have a further reason to assure the presiding officer adequate power to control a hearing. We now have to decide, with few exceptions, adjudicatory cases within 12 months of filing and other matters within 18 months. An impotent presiding officer faced with an intransigent litigant could not manage the case expeditiously, resulting, perhaps, in actual harm to other participants.” (*Joint Application of Pacific Enterprises, et al.* (1998) D.98-03-073, p. 126.)

More recently, the Commission revisited this topic yet again in ruling upon a buyout and termination of a power purchase agreement. Affirming the ALJ’s rulings with respect to the applicant’s request for a protective order, the Commission stated the following:

“Before turning to the merits of this case, we remind SCE that our Rules clearly state that the presiding officer has authority to rule upon ‘all objections or motions which do not involve final determination of proceedings.’ (Rule 63.) Through these Rules, the Commission has delegated the authority to make procedural rulings to the presiding officer in each proceeding. The Commission has articulated its reluctance to review evidentiary and procedural rulings before the proceeding has been submitted. While noting that interlocutory appeals from ALJ Rulings on procedural matters are not absolutely barred, the Commission has consistently expressed reluctance to consider them.” (*Application of Southern California Edison Company* (2000) D.00-05-018, p. 5.)

Where extraordinary circumstances prevail, such as the need to address a novel issue, the presiding officer may exercise his or her discretion to refer an

evidentiary or procedural matter to the Commission, and the Commission may exercise its discretion to consider interlocutory appeals of presiding officer rulings on such matters.² The ALJ determined that such circumstances exist here, and, accordingly, referred the issue to us by issuing a draft decision for our consideration. We take up SDG&E's Motion for Reconsideration, notwithstanding our general reluctance to consider interlocutory appeals, because we wish to clearly establish the applicability of our procedural rules in this pending proceeding.

4.2 Ex Parte Communications

Ordering Paragraph 2 of the May 16 ACR directs SDG&E to comply with Commission rules governing the reporting of ex parte communications. SDG&E believes that it should not be required to publicly report communications with Commission decisionmakers when the communications are settlement discussions pertaining to federal or state court litigation issues between SDG&E and the Commission. SDG&E believes that such public reporting is contrary to state and federal law upholding and validating the expectation of privacy

² For example, in *Re Alternative Regulatory Frameworks for Local Exchange Carriers* (1994) 55 CPUC2d 672, the Commission addressed a novel issue of whether an association could be compelled to answer a data request with respect to the association's individual members, or to require the individual members to respond. The Commission explicitly stated that it was granting an exception to the interlocutory appeal rule "because of possible ramifications the [ALJ's] ruling could have in other proceedings where an association is a party to the proceeding." (*Id.*, 676.) In *Re Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks* (1996) 66 CPUC2d 247, the Commission took up an appeal of a procedural ruling where resolution of the procedural schedule depended on a statutory interpretation (Pub. Util. Code § 709.5 required the Commission to establish rules and regulations at issue in the proceeding by a certain date).

inherent in settlement discussions. Further, SDG&E believes that such a reporting requirement is inconsistent with established Commission policy and practice pertaining to settlement of litigation in which the Commission is a party. Finally, SDG&E claims that such a requirement is contrary to the Commission's own rules for settlement of proceedings.

In most circumstances we would fully concur with SDG&E's assertions regarding the need to maintain confidentiality of litigation discussions. However, SDG&E fails to recognize the unique circumstances of this case. The procedural issue before us today arises because the substantive issues in the litigation addressed by the proposed Settlement Agreement are in several respects the same as or similar to the issues in a pending commission proceeding. In fact, as noted below, the Commission has expressly determined that issues that would be resolved by the proposed Settlement Agreement are subject to further review. The Commission has not yet had an opportunity to complete that review. Discussion of the proposed Settlement Agreement necessarily invokes discussion of the issues in the instant proceeding. SDG&E appears to acknowledge this fact but it fails to acknowledge its significance.³

In effect, SDG&E posits that the existence of litigation to which the Commission is a party trumps all procedures governing Commission

³ For example, at p. 2 of the Motion for Reconsideration, SDG&E states that "the proposed settlement agreement, by resolving SDG&E's federal claims, would also resolve certain issues currently the subject of litigation in this consolidated docket..." Also, in the proposed Settlement Agreement itself, SDG&E acknowledges the overlap of issues in the federal litigation and this proceeding by suggesting that it would "submit revised/updated testimony in A.00-10-045/A.01-01-044 consistent with this settlement." (Proposed Settlement Agreement, p. 5.)

proceedings that conflict or interfere with disposition of the litigation. However, the present circumstances lead us to conclude that the Commission's rules and procedures for administering its own proceedings should be observed in lieu of the procedures generally applicable to litigation to which the Commission is a party. In D.01-05-035 the Commission determined that the power procurement contracts at issue here are subject to further review in this consolidated proceeding.⁴ Section 1701.3(c) of the Public Utilities Code prohibits substantive communications on matters pending before the commission in ratesetting proceedings unless an initial contact is preceded by three day's notice and an opportunity for all parties to be heard, and unless the communicating party files and serves a notice of the communication. When a party offers a written communication, it must provide it to all other parties the same day. These are absolute obligations, which the communicating party cannot evade by claiming that the issue also relates to pending litigation. To the extent that it has communicated matters covered by Section 1701, et seq., and our rules, SDG&E has waived any confidentiality protections that might otherwise apply.

We conclude that it is wholly appropriate for purposes of this proceeding to treat the proposed Settlement Agreement or any similar proposal by SDG&E as a unilateral proposal by SDG&E that addresses substantive issues in the instant proceeding, notwithstanding SDG&E's tender of the proposal as means of resolving litigation brought by SDG&E. It follows that to the extent that SDG&E

⁴ Pursuant to an Administrative Law Judges' Joint Ruling dated April 8, 2002, issued in the "Rate Stabilization Proceeding" (A.00-11-038, et al.) as well as these consolidated proceedings of SDG&E, the "further review" of the contracts that is discussed at p.10 of D.01-05-035 was transferred from A.00-11-038 et al. to these proceedings.

communicated with decisionmakers regarding issues addressed by the proposed Settlement Agreement that are pending in this proceeding in other than a public hearing, workshop, other public setting, or on the record, a reportable communication has occurred. We therefore affirm Ordering Paragraph 2 of the May 16 ACR.

4.3 Settlement Rules

Ordering Paragraph 3 of the May 16 ACR directs SDG&E to observe the Commission's rules governing stipulations and settlements if it wishes to pursue implementation of the proposed Settlement Agreement or any other settlement regarding issues in this proceeding. SDG&E claims that compliance with this requirement is impossible, because the federal court litigation that is the subject of the proposed Settlement Agreement has as parties SDG&E and each of the Commissioners. In contrast, SDG&E notes, the Commission's settlement rules pertain only to parties to a Commission proceeding. Individual Commissioners and the Commission itself are not parties in a Commission proceeding. Furthermore, SDG&E observes, none of the parties in this proceeding are parties to the federal court litigation, and application of the Commission's settlement rules pursuant to Ordering Paragraph 3 of the May 16 ACR would require SDG&E to waive its right to protect the confidential nature of its settlement discussions and negotiations.⁵ SDG&E asserts that the Commission has no legal right to force it to make such a waiver, and SDG&E itself is unwilling to do so.

⁵ As City correctly notes in its comments on the draft decision, SDG&E has presented the Settlement Agreement as a settlement of federal litigation only, but it would effectively settle state appellate court litigation in Case No. D038064 (SDG&E v. CPUC, California Court of Appeals, Fourth Appellate District, Division one) as well. City is a real party in interest in that litigation.

Once again SDG&E ignores the distinguishing feature of the litigation that is associated with this proceeding--the common identity of issues that have not yet been adjudicated by the Commission with those SDG&E seeks to resolve through its proposed Settlement Agreement. By electing to bring its offer to settle the federal litigation to the Commission at this stage of this proceeding, SDG&E places itself under the rules governing the conduct of Commission proceedings. Any settlement of the issues being adjudicated by the Commission is appropriately processed under Article 13.5 (Rule 51, et seq.) of the Commission's procedural rules. We therefore affirm Ordering Paragraph 3 of the May 16 ACR.

5. Comments on Draft Decision

The draft decision was issued in accordance with Public Utilities Code Section 311 (g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed by SDG&E, City, and UCAN, and have been addressed herein to the extent necessary or appropriate. No reply comments have been received.

Findings of Fact

1. SDG&E's Motion for Stay of enforcement of Ordering Paragraphs 2 and 3 of the May 16 ACR was not acted upon by the presiding officer, and, because the Motion for Reconsideration is resolved by this decision, the Motion for Stay is moot.
2. SDG&E's Motion for Reconsideration presents circumstances warranting Commission consideration of an interlocutory appeal of a presiding officer's ruling.
3. The issues in the litigation addressed by the proposed Settlement Agreement are substantially the same as or similar to issues pending in this

commission proceeding, and discussion of the proposed Settlement Agreement necessarily invokes discussion of issues in the instant proceeding.

4. To the extent that SDG&E communicated with decisionmakers regarding issues addressed by the proposed Settlement Agreement that are pending in this proceeding in other than a public hearing, workshop, other public setting, or on the record, a reportable communication has occurred.

5. By electing to bring its offer to settle the federal litigation to the Commission at this stage of this proceeding, SDG&E places itself under the rules governing the conduct of Commission proceedings.

1. By characterizing the proposed Settlement Agreement as settlement of federal litigation, SDG&E has neglected the effect of the proposed Settlement Agreement on state litigation to which city of San Diego is a real party in interest, in addition to being a party to the proceedings.

Conclusions of Law

1. Because this decision resolves the Motion for Reconsideration, SDG&E's Motion for Stay should be dismissed as moot.

2. SDG&E's request for a Commission order vacating Ordering Paragraphs 2 and 3 of the May 16 ACR should be denied, and the ACR should be affirmed.

3. SDG&E should file and serve ex parte notices for any substantive communications in which it participated with decisionmakers relating to matters pending this proceeding.

4. This order should be effective today.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company's (SDG&E) Motion for the Issuance, on an Ex Parte Basis, of an Immediate Stay of Assigned Commissioner's Ruling Directing (1) Service of Documents and (2) Filing of Notice of Ex Parte Communication is dismissed as moot.

2. SDG&E's request to vacate Ordering Paragraphs 2 and 3 of the May 16, 2002 Assigned Commissioner's Ruling Directing (1) Service of Documents and (2) Filing of Notice of Ex Parte Communication is denied, and the ruling, as clarified by the June 7, 2002 ruling, is hereby affirmed.

This order is effective today.

Dated _____, at San Francisco, California.